86-1258

No. _____

Supreme Court, U.S.
FILED
JAN 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

DIERK HAGEMANN,

Appellant and
Petitioner,

[No. 85-6603]

[D.C. No.
CV 85-3225 HLH]

vs.

AMERICAN SAVINGS AND
LOAN ASSOCIATION,

Appellee and
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STEVEN A. SCHWABER
MORLEY G. MENDELSON
KADENACY, MENDELSON & SCHWABER
612 South Flower Street
Suite 602
Los Angeles, California 90017
(213) 622-6671

Attorneys for Appellant and
Petitioner DIERK HAGEMANN

10 cop

THE QUESTIONS PRESENTED FOR REVIEW

The sole major issue presented for review in this case is the question of whether a United States Bankruptcy Court has the right and duty to inquire into the reasonableness of a pre-petition foreclosure sale by a secured lender. Put in another way, this issue squarely confronts under the facts of this case the clear and apparently irreconcilable split among the Circuit Courts of Appeal exemplified by Durrett v. Washington National Insurance Company, 621 F.2d 201 (5th Cir. 1980) and In re Madrid, 725 F.2d 1197 (9th Cir. 1984).

The facts in the instant case show $600,000 of equity unrealized at the foreclosure sale which under Durrett would be available to other creditors of

the Debtor, and under Madrid would be a windfall to the foreclosing senior secured creditor.

The Ninth Circuit Court of Appeals explicitly recognized its decision to be incompatible with the Durrett decision.

PARTIES TO THE PROCEEDING

All of the parties to the proceeding in the court whose judgment is sought to be reviewed are set forth in the caption of the case in this Court.

TABLE OF CONTENTS

	Page
THE QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
DECISIONS AND OPINIONS OF THE COURTS BELOW	1
GROUNDS FOR JURISDICTION	2
STATUTES INVOLVED IN THIS PETITION	3
CONCISE STATEMENT OF THE CASE	4
BASIS FOR FEDERAL JURISDICTION	7
ARGUMENT FOR ALLOWANCE OF THE WRIT (RULE 17)	8
APPENDIX A	A-1
APPENDIX B	B-10
APPENDIX C	C-23

TABLE OF AUTHORITIES

Cases	Page
Durrett v. Washington Insurance Company, 621 F.2d 201 (5th Cir. 1980)	i, ii, 8, 9, 10
In re Madrid, 725 F.2d 1197 (9th Cir. 1984)	i, ii, 1, 8, 10, 11, 12

Statutes	
Title 11, United States Code, Section 301	7
Section 548	3, 10
Title 28, United States Code, Sections 157 & 158	7
Section 1254	2
Bankruptcy Code, Section 548	8

No. _____

IN THE

SUPREME COURT

OF THE UNITED STATES

October Term, 1986

DIERK HAGEMANN,

Appellant and
Petitioner,

[No. 85-6603]

vs.

[D.C. No.
CV 85-3225 HLH]

AMERICAN SAVINGS AND
LOAN ASSOCIATION,

Appellee and
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DECISIONS AND OPINIONS OF THE COURTS BELOW

The first decision below was that of the United States Bankruptcy Court for the Central District of California. Bankruptcy Judge Russell ruled in favor of the foreclosing creditor on the grounds that he was bound by the decision in the Madrid opinion. The United States District Court affirmed on the same basis.

The Ninth Circuit Court of Appeals affirmed the United States District Court citing the Madrid case without comment.

These decisions are set forth in full in the appendix.

GROUNDS FOR JURISDICTION

This petition is taken pursuant to the memorandum opinion of the United States Court of Appeals for the Ninth Circuit affirming the Bankruptcy Court opinion. The date of this judgment was November 3, 1986; there was no order respecting a rehearing.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari is 28 U.S.C. Section 1254.

STATUTES INVOLVED IN THIS PETITION

The statute which is the basis of this petition is 11 U.S.C. Section 548 in its entirety. This section sets forth the powers of a trustee or debtor-in-possession to avoid fraudulent transfers and obligations.

This statute is lengthy, and is set forth in full in the appendix.

CONCISE STATEMENT OF THE CASE

Debtor Hagemann was the owner and occupier of the residential real property in question. American Savings was the holder of the first Deed of Trust on the subject property and on September 5, 1984, conducted a foreclosure sale of the subject property pursuant to a previously recorded Notice of Default; there were no bidders other than the trust deed holder at the sale, and American Savings bid in the amount of its Note at the time of the sale.

The amount bid by American Savings at the trustee's sale was approximately $330,000. It was stipulated by the parties in the Bankruptcy Court proceedings that at the

time of the sale to American Savings, the value of the subject property was approximately $950,000. Thus, at the time of the foreclosure sale, there was in excess of $600,000 in equity in the property to which American Savings asserts the sole right.

On October 24, 1984, Debtor Hagemann filed his petition in the United States Bankruptcy Court for the Central District of California under Chapter 11 of Title 11 of the United States Code. The bankruptcy schedules show approximately $11,000 in priority unsecured debt to taxing authorities and over $400,000 in obligations secured by junior liens on the residential real property, which become unsecured obligations in the event that the

foreclosure sale is upheld by this Court.

Therefore, the question is squarely presented whether the $600,000 in surplus value of the subject property remains with the senior foreclosing lien to the detriment of the junior creditors or whether this equity may be preserved for the benefit of other creditors of the Debtor.

BASIS FOR FEDERAL JURISDICTION

As stated previously, this is a bankruptcy case and the basis of federal jurisdiction is 28 U.S.C. Sections 157 and 158, and 11 U.S.C. Section 301.

ARGUMENT FOR ALLOWANCE OF THE WRIT (RULE 17)

As stated above, this case squarely presents the conflict among the various federal circuits in determining the authority of a Bankruptcy Court to inquire into the reasonableness and validity of non-judicial foreclosure sales which occurred prior to the filing of a bankruptcy petition. The two leading cases in this area are Durrett v. Washington National Insurance Company, supra, 621 F.2d 201 (5th Cir. 1980) which found that the Bankruptcy Court in fact had such authority, and In re Madrid, supra, 725 F.2d 1197 (9th Cir. 1984), which held that if the making of the Deed of Trust occurred outside of the fraudulent transfer period specified in Section 548 of the Bankruptcy Code, the

Bankruptcy Court had no such authority regardless of when the foreclosure sale occurred. As stated above, the Ninth Circuit Court of Appeal expressly recognized the incompatibility of these two opinions.

As of the time of this petition, the circuits are badly divided on this question, with the majority following the Durrett approach.

In the instant case, the sole asset with enough equity to pay the Debtor's creditors is his personal residence. It was agreed between the Debtor and American Savings that at the time of the foreclosure sale, the fair market value of the Debtor's residence was not less than $950,000;

notwithstanding this, there were no bidders at the foreclosure sale other than American Savings, which bid in the amount due it under its Note and Deed of Trust, which was about $330,000. In those districts following the Durrett doctrine, the Bankruptcy Court has the authority to inquire into such a sale to ascertain whether the trustee conducted the sale in a manner reasonably calculated to bring a commercially reasonable price for the security. In those circuits following the Madrid doctrine (including that in the instant case), the Bankruptcy Court may not inquire into the reasonableness of the foreclosure sale as long as the transfer of security took place beyond the time period specified in 11 U.S.C. Section 548.

Petitioner submits that the effect of the Madrid doctrine is to eliminate the flexibility of the Bankruptcy Court which the entire Bankruptcy Code structure imparts to it. This is borne out by the fact that the petitioner invited the Ninth Circuit to differentiate Madrid from the instant case both on the basis that in Madrid there was no evidence of gross disparity between market value and foreclosure sale price, and on the further ground that the only transfer which could take place at the passing of the security interest is that of the value of the property as agreed upon at that time as security, with the passing of any excess equity over that value occurring at the time of the foreclosure sale. The Ninth Circuit declined to make any such factual

distinction, finding that Madrid in fact controlled this situation as well.

Thus, the issue of the existence of discretion in the Bankruptcy Court to make such an inquiry is squarely and unavoidably presented by this case. This case will serve to resolve the split in authority among the circuits on this very important and as of now unresolved major issue in bankruptcy law.

Of course, the underlying similarities and distinctions of each of the cases will be thoroughly briefed for this Court if the petition is granted.

Therefore, petitioner respectfully submits to this Court that the question presented by this petition is

ripe for resolution and in fact must be resolved in order to create uniformity on this issue on a nationwide basis; as interstate banking becomes more and more prevalent, the existing split among the Circuit Courts of Appeal on this issue will substantially impede financial transactions which cut across circuit lines unless this issue is accepted and resolved by this Court. For these reasons, it is respectfully submitted and requested that this Court grant the petition for certiorari and accept this case for full argument.

DATED: January 28, 1987

KADENACY, MENDELSON & SCHWABER

By _____
Steven A. Schwaber
Attorneys for Appellant

APPENDIX A

N O T F O R P U B L I C A T I O N

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re:	)	No. 85-6603
	)	
DIERK HAGEMANN,	)	D.C. No.
	)	CV 85-3225 HLH
Debtor.	)	
	)	MEMORANDUM*
	)	
DIERK HAGEMANN,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	
	)	
AMERICAN SAVINGS AND LOAN ASSOCIATION,	)	
	)	
Defendant-Appellee.	)	
	)	

Appeal from the United States
District Court for the Central District
of California
Harry L. Hupp, District Judge, Presiding
Argued and Submitted September 2, 1986
Pasadena, California

Before: SCHROEDER, CANBY and THOMPSON
Circuit Judges

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

On April 1, 1980, plaintiff-appellant Dierk Hagemann, Veronica Hagemann, as trustors, executed a deed of trust in favor of State Savings and Loan Association to secure a note to State Savings in the sum of approximately $300,000. The deed of trust was recorded April 4, 1980. Some three years later payments under the note were in default. Notice of default was recorded February 27, 1984. The default was not cured and on September 5, 1984 a foreclosure sale was held; the property was sold to defendant-appellee American Savings and Loan Association ("American"), successor to State Savings. A trustee's deed conveying the foreclosed property to American was recorded September 10, 1984.

On October 24, 1984, Dierk Hagemann filed a Chapter 11 petition in

bankruptcy. He then filed a complaint in the bankruptcy proceeding against American seeking to set aside the foreclosure trustee's conveyance of the property to American as a transfer under 11 U.S.C. Section 548 within one year of the filing of the Chapter 11 petition for less than a reasonably equivalent value. He alleged that at the time American acquired title to the property as a result of the foreclosure sale the property was worth more than $1,100,000 and the debt against it in favor of American was approximately $340,000. Hagemann also alleged "state claims" in which he contended the foreclosure sale was defective for lack of notice under California law.

The bankruptcy court concluded that

under In re Madrid, 725 F.2d 1197 (9th Cir.), cert. denied, 105 S. Ct. 125 (1984), the property was "transferred" in 1980 when the deed of trust was recorded, not in 1984 when the foreclosure sale took place. A judgment was entered in favor of American. In its order upon which judgment was entered, the bankruptcy court stated, with regard to the "state claims:"

> The Court reserves determination of the other issues raised by plaintiff Hagemann's Complaint herein pending the outcome of plaintiff's intended appeal of this Order.

The district court affirmed the bankruptcy court's order. We affirm the judgment of the district court.

I

JURISDICTION

Although the bankruptcy court did

not specifically state it was making a Rule 54(b) certification when it entered its order reserving determination of the state claims while Hagemann appealed that court's ruling on the claim under 11 U.S.C. Section 548, specific reference to Rule 54(b) is not essential for certification. See Bryant v. Technical Research Co. 654 F.2d 1337, 1341 n.3 (9th Cir. 1981) (court did not refer to 54(b), but used certification language). We believe that the bankruptcy court's statement in its order referring to Hagemann's "intended appeal of this Order," coupled with the entry of the order as a final judgment, can be interpreted as a Rule 54(b)

certification.1/ We apply a "pragmatic approach" to determine the finality of a bankruptcy court's order. In re Stanton, 766 F.2d 1283, 1285 (9th Cir. 1985); In re Mason, 709 F.2d 1313, 1318 (9th Cir. 1983). Accordingly, we conclude we have jurisdiction to hear this appeal.

1/ Rule 54(b) applies to adversary proceedings in bankruptcy by virtue of Bankruptcy Rule 6054, In the Matter of King City Transit, inc., 738 F.2d 1065, 1066 (9th Cir. 1984) (per curiam), King City Transit arose under 28 U.S.C. Section 1293(b), which was eliminated by the bankruptcy amendments. We have held, however, that our decisions regarding finality under section 1293 are controlling in cases arising under section 158. In re Teleport Oil Co., 759 F.2d 1376, 1377 n.1 (9th Cir. 1985).

II

MERITS

A trustee in bankruptcy may avoid a transfer of a debtor's interest in property, under certain circumstances, if the transfer is "made or incurred on or within one year before the date of the filing of" a voluntary or involuntary petition in bankruptcy. 11 U.S.C. Section 548 (Supp. III 1985). The question of what constitutes a "transfer" for bankruptcy purposes is a matter of federal law. McKenzie v. Irving Trust Co., 323 U.S. 365, 369-70 (1945). A "transfer" under federal law "is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred

that is superior to the interest in such property of the transferee." 11 U.S.C. Section 548(d)(1) (Supp. III 1985). The question of when and how an interest in property is so perfected is a matter of state law. Madrid, 725 F.2d at 1200; Evans v. Valley West Shopping Center, Inc., 567 F.2d 358, 360 (9th Cir. 1978) (per curiam). Under California law, perfected of the lien of a deed of trust occurs when a properly executed deed of trust is recorded. Cal. Civ. Code Sections 1213, 2952, 2934 (West 1974). Cf. Madrid, 725 F.2d at 1200 (construing Nevada law).

In the present case, perfection of the deed of trust occurred more than one year prior to the filing of Hagemann's bankruptcy petition. The deed of trust was recorded April 4, 1980. The

bankruptcy petition was filed October 24, 1984. Thus, the transfer is not subject to attack under 11 U.S.C. Section 548. Madrid, 725 F.2d at 1199.

AFFIRMED.

APPENDIX B

LAW OFFICES OF STEVEN B. STABLER
5200 West Pico Boulevard
Los Angeles, CA 90019
(213) 938 6188

Attorney for Defendant
AMERICAN SAVINGS AND
LOAN ASSOCIATION

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re	No. LA 84-21176 BR
DIERK HAGEMANN,	Adv. LA 84-53394 BR
Debtor.	Chapter 11
DIERK HAGEMANN, Plaintiff, v. AMERICAN SAVINGS AND LOAN ASSOCIATION, Defendant.	ORDER ADJUDICATING IN FAVOR OF DEFENDANT AND AGAINST PLAINTIFF ON PLAINTIFF'S CLAIM OF FRAUDULENT TRANSFER [11 U.S.C. SECTION 548]

Date of Hearing: March 18, 1985

Time of Hearing: 2:00 p.m.

Location of
Hearing: Courtroom "A", Eighth Fl.

This adversary proceeding came on for hearing on March 18, 1985, before the Court, the Honorable Barry Russell, United States Bankruptcy Judge, presiding. Appearing were Steven A. Schwaber as attorney for plaintiff and Steven B. Stabler as attorney for defendant.

The Court finds, and the parties agree, that the following facts are undisputed:

1. On or about April 1, 1980, Dierk and Veronica Hagemann, as trustors, executed a deed of trust granting an interest in the property commonly known as 631 Paseo de la Playa in Torrance, California, to State Savings and Loan Association as beneficiary.

2. Said deed of trust secured a promissory note in the amount of

approximately $300,000 given by trustors to the lender, State Savings and Loan Association.

3. State Savings and Loan Association was a predecessor-in-interest to American Savings and Loan Association, defendant herein ("American").

4. Said deed of trust was recorded in the offices of the Los Angeles County Recorder on April 4, 1980, as instrument no. 80-343967.

5. On or about February 27, 1984, a Notice of Default was recorded in the offices of the Los Angeles County Recorder as instrument no. 84-236138, reflecting trustors' delinquency in making payments due under the terms of the promissory note given State Savings and Loan Association.

6. A Notice of Trustee's Sale was

recorded in the offices of the Los Angeles County recorder on June 1, 1984. Said Notice recited, inter alia, that a default had occurred under the April 1, 1980 deed of trust; that a sale at public auction would be held on June 27, 1984, at 10:00 a.m. at the front entrance ot the Westchester Municipal Building, 7166 West Manchester Boulevard, Los Angeles, California; that principal in the amount of $298,747.56 with interest thereon from October 1, 1983, at 15% plus costs of $5,964.50 with interest was due and owing to American.

7. On or about June 25, 1984, Steven A. Schwaber ("Schwaber"), attorney for debtor/trustor, Dierk Hagemann ("Hagemann"), discussed with Les Kreig ("Kreig"), Senior Loan Counselor for American, arrangements whereby Hagemann

could avoid foreclosure by making payments of stated amounts on scheduled dates.

8. As a result of the foregoing conversation, on or about July 3, 1984, Krieg sent Schwaber a letter addressed to Hagemann and a Forbearance Agreement to be executed by Hagemann. The letter, dated July 3, 1984, set forth a schedule of payment dates and concommitant trustee's sale dates if payment was not received by American as scheduled. The letter noted "after each scheduled payment is made the Trustee Sales officer postpones the sale date to the next month."

9. The Forbearance Agreement was executed by Hagemann on a date unknown and received by American on August 8, 1984.

1. The trustee's sales noticed for June 27, 1984, July 11, 1984, and August 8, 1984 were postponed as a consequence of the timely receipt by American of the payments agreed to by Hagemann under the Forbearance Agreement. Declarations of Postponement of Trustee's Sales pursuant to California Civil Code section 2924g(d) were executed, for each postponement, by the auctioneer following announcement of the postponement of public sale and the reason therefor at the time and place of auction.

12. By letter dated August 3, 1984, Schwaber thanked Krieg for his courtesy and cooperation in accommodating Hagemann's efforts to cure his default.

13. The payment of $3,786.67, due September 1, 1984, was not made on or before that date.

14. On September 4, 1984, Krieg telephoned Schwaber, informing him that the Trustee's Sale of Hagemann's property was scheduled for the following day and could not be postponed unless payment were received.

15. Payment not having been received, the Trustee's Sale of Hagemann's property took place at 10 a.m. on September 5, 1984 as scheduled.

16. Later the same day, Hagemann told Krieg by phone that he had appeared at the Redondo Beach branch of American at approximately 10:55 a.m. that day to make his September 1 forbearance payment. Hagemann stated he had thought the Trustee's Sale date was September 7, 1984.

17. Krieg inquired of his superior at American, Brian Hills, if anything

could be done to cancel the sale and accept the proferred payment.

18. A Trustee's Deed, dated September 5, 1984, conveying Hagemann's property to American for $338,790.72 after bid at public auction on September 5, 1984, was recorded in the offices of the Los Angeles County recorder on September 10, 1984, as instrument no. 84-1085824. Said Trustee's Deed recites inter alia: "All requirements of law regarding the mailing, personal delivery and publication of copies of Notice of Default and Election to Sell Under Deed of Trust and Notice of Trustee's Sale, and the posting of copies of Notice of Trustee's Sale have been complied with."

19. On or about October 24, 1984, debtor herein filed a voluntary petition in bankruptcy under Chapter 11 of Title

11 of the United States Code.

20. As of March 18, 1985, the property commonly known as 631 Paseo de la Playa in Torrance, California, acquired by American under the Trustee's Deed, had an appraised value of between $950,000 and $960,000.

The present Order is addressed to debtor/plaintiff's allegation in the Complaint filed in these adversary proceedings that the Trustee's Sale to American of the aforesaid property constituted a fraudulent transfer within the meaning and operation of 11 U.S.C. section 548 by reason of the alleged difference in the sale purchase price and the fair market value of the property at the time of sale.

The Court finds that the law governing a determination of debtor/plaintiff's claim of fraudulent transfer under 11 U.S.C. section 548 is as follows:

1. The transfer of an interest of the debtor in property may be avoided if the transfer was made on or within one year before the date of the filing of the petition in bankruptcy. 11 U.S.C. section 548(a).

2. Such avoidable transfer "is made when such transfer becomes so far perfected that a bona fide purchaser from the debtor against whom such transfer could have been perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee ..."11 U.S.C. section 548(d)(1).

3. State law determines the time and method of perfection of the transfer. In re Madrid, 725 F.2d 1197, 10 CBC2d 347 (9th Cir. 1984); In re Alsop, 14 B.R. 982, 986 (1981); aff'd., 22 B.R. 1017 (D. Alaska 1982).

4. Under California law, the trustee's sale has the effect of vesting the purchaser with title as of the date the trust deed was executed; therefore, the transfer occurs and is perfected at the time of the recording of the original deed of trust. Evans v. Valley West Shopping Center, Inc., 567 F.2d 358, 360 (9th Cir. 1978).

5. A transfer more than one year prior to the filing of the bankruptcy petition is not voidable under 11 U.S.C. section 548. In re Madrid, 725 F.2d 1197, 10 CBC2d 347 (9th Circuit 1984); In re Alsop, 14 B.R. 982 (1981); aff'd., 22

B.R. 1017 (D. Alaska 1982).

6. The consideration received at a non-collusive, regularly conducted public sale, open to all bidders and creditors, satisfies the "reasonably equivalent value" requirement of 11 U.S.C. section 548(a)(2)(A). In re Madrid, 21 B.R. 424, 425 (9th Cir. Bkrtcy. App. 1982).

The Court reserves determination of the other issues raised by plaintiff Hagemann's Complaint herein pending the outcome of plaintiff's intended appeal of this Order.

By reason of the foregoing, IT IS ORDERED that the claim asserted by plaintiff Hagemann as to the voidability

of the Trustee's Sale of the property commonly known as 631 Paseo de la Playa in Torrance, California, under 11 U.S.C. section 548, shall, on final judgment of these adversary proceedings, be dismissed; that plaintiff Hagemann shall take nothing by reason of said claim; and that defendant American shall recover of plaintiff Hagemann its costs of suit and such attorneys fees as are provided by law.

Dated: 4-26-85

BARRY RUSSELL, JUDGE
UNITED STATES BANKRUPTCY
COURT

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV85-3225-HLH

Date November 18, 1985

Title In re Dierk Hagemann
(Bankruptcy Appeal)

DOCKET ENTRY

TENTATIVE RULING

PRESENT:

HON. HARRY L. HUPP, JUDGE
Robert Bolton
(Deputy Clerk)

Bob Stark
(Court Reporter)

ATTORNEYS PRESENT FOR PLAINTIFFS:
(APPELLANTS)

Steven Schwaber
J. Stang (Trustee)

ATTORNEYS PRESENT FOR DEFENDANTS:

Steven Stabler
Wm. Ramsey

PROCEEDINGS: BANKRUPTCY APPEAL

[Single spaced on original copy]

The judgment of the Bankruptcy Court is affirmed.

Jurisdictional problems noted at the time the matter was last set for argument have been resolved by the stipulated order allowing this appeal to go forward as an interlocutory appeal.

This case is governed by Madrid (9th Cir. 1984) 725 F.2d 1197 unless the 1984 act has the effect of reversing Madrid. The findings of the Bankruptcy Court are not disputed; only the conclusion is argued. Accepting the facts found, the deed of

trust, whose power of sale foreclosure is sought to be set aside, was executed and recorded more than 1 year prior to the filing of the Chapter 11 proceeding. For the sale under the power of sale provision of the deed of trust to be set aside as a fraudulent conveyance, the "transfer" must be said to have been within that year. Madrid holds that the transfer for purposes of the set-aside provision takes place when the deed of trust is properly executed and recorded. Under Madrid, it is not relevant that the sale under the power of sale provision takes place within a year of the bankruptcy filing. Thus, the set-aside provisions of 11 USC Section 548 do not come into play at all and there is no inquiry into adequacy of consideration. All of this was settled law in the 9th

Circuit, which did not follow the contrary rule of the 5th Circuit (Durrett (5th Cir. 1980) 621 F.2d 201.). The only inquiry left for this court is whether the amendments contained in the 1984 act in effect overruled Madrid and adopted Durrett. The court holds that they did not.

With respect to Section 548, the words "voluntarily/or involuntarily" were added as a predicate of the phrase "received less than a reasonably equivalent value". However, nothing was done to modify the requirement that the transfer be within a year. Here, if the transfer (recording of the deed of trust) had been within a year, the involuntary nature of receiving less than full value on a power of sale foreclosure might have been considered.

But, since the transfer was more than a year prior to filing, the question of whether less than full value was received, whether voluntarily or involuntarily, is not reached. In short, adding the word "involuntarily" has nothing to do with the question of when the transfer takes place.

The Trustee points out that Congress also amended the definition of transfer in Section 101(48) to add as a transfer a "foreclosure of the Debtor's equity of redemption". Assuming, without deciding, that this language is applicable to Section 548 proceedings, the hole in the argument that in a situation involving a sale under the power of sale provision of a deed of trust, there is, under California law, no "equity of redemption"

to be foreclosed. The new language must be held to be limited to those situations where state law provides for redemption rights (i.e., in California, where the foreclosure is in a judicial proceeding). The term "equity of redemption" has never been thought to refer to the privilege to reinstate which preceeds the sale.

Accordingly, the court holds that Madrid was untouched by the 1984 amendments. This conclusion is reinforced by the Congressional history cited by Appellee, wherein Senator Dole, in answer to questions, stated that the 1984 amendments were not intended to resolve the Madrid-Durrett inconsistency.

The court does not reach the alternative holding of the Bankruptcy Court that the

amount received is automatically to be considered "equivalent value" where the sale is publicly noticed. Since there is no transfer, it is not necessary to decide the point (see Madrid, at page 1199).

Appellee requests sanctions for a frivolous appeal. The request is denied. This is not a "frivolous" question at all, and, in fact, should go to the 9th Circuit so that the effect, in any, of the 1984 amendments may be definitively determined.

Supreme Court, U.S.
FILED
MAR 4 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1258

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DIERK HAGEMANN,
Petitioner,

VS.

AMERICAN SAVINGS AND LOAN ASSOCIATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STEVEN B. STABLER*
6404 Wilshire Boulevard
Los Angeles, CA 90048
(213) 655-6985

ROBERT F. KIDD
LAWRENCE A. CALLAGHAN
MILLER, STARR & REGALIA
101 California Street
Suite 2200
San Francisco, CA 94111
(415) 982-3838

**Counsel of Record*
for Respondents

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTIONS PRESENTED FOR REVIEW

1. Whether a nonjudicial foreclosure sale of real property may be voided as a fraudulent conveyance under 11 U.S.C. section 548, when the deed of trust under which the foreclosure sale was conducted was perfected more than one (1) year before the filing of the petition for relief under Title 11 of the United States Code?

STATEMENT OF CORPORATE RELATIONSHIP

American Savings and Loan Association ("American") is a corporation which is a wholly-owned subsidiary of Financial Corporation of America, a corporation. American has no subsidiaries, other than wholly-owned subsidiaries, and no affiliates.

TABLE OF CONTENTS

	Page
Restatement of Question Presented	i
Statement of Corporate Relationship	ii
Table of Authorities	iv
Restatement of the Case	1
Reasons for Denying the Petition	2
Argument	2
I	
The Purported Conflict Between The Circuits Is Immaterial To The Resolution Of This Controversy	2
II	
The Petition Does Not Articulate On Important Question Of Federal Law Which Should Be Settled By This Court	3
Conclusion	4
Appendix R-A	A-1

TABLE OF AUTHORITIES

Cases

Page

Durrett v. Washington National Insurance Company, 621 F.2d 201 (C.A.5th, 1980) 2

In re Madrid, 725 F.2d 1197 (C.A.9th, 1984), *cert. denied*, 469 U.S. 833 (1985) 2, 3

Statutes and Rules

11 U.S.C. Section 548 ..... 2, 3

11 U.S.C. Section 67 (repealed) 3

No. 86-1258

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DIERK HAGEMANN,
Petitioner,

VS.

AMERICAN SAVINGS AND LOAN ASSOCIATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

RESTATEMENT OF THE CASE

Because Petitioner's Concise Statement of the Case fails to describe proceedings below, Respondent submits the following Restatement of the Case.

On October 24, 1984, Petitioner filed his petition for relief, under Title 11 U.S. Code, entitled *In re Hagemann,* Chapter 11 Case No. LA 84-21176-BR, United States Bankruptcy Court, Central District of California. On December 21, 1984, Petitioner filed in the same court his Complaint To Set Aside Sale (Defective Sale), Adversary Proceeding No. LA 84-53394-BR. [Appendix R-A]. The complaint sought to void a nonjudicial foreclosure sale conducted by Respondent in September, 1984, by which Respondent sold and purchased the Petitioner's residence. The complaint sought to void the foreclosure sale on two alleged grounds: (i) the sale failed to comply with the procedural requirements of California Civil Code sections 2924, *et seq.,* and (ii) the

sale constituted a fraudulent conveyance under U.S.C. section 548.

On April 26, 1985, the Bankruptcy Court entered its Order Adjudicating In Favor Of Defendant And Against Plaintiff On Plaintiff's Claim Of Fraudulent Transfer (11 U.S.C. Section 548). By the order's terms, the Bankruptcy Court: (i) adjudicated against Petitioner the claim that the foreclosure sale constituted a fraudulent transfer under 11 U.S.C. section 548, and (ii) left for future proceedings the remaining state law issues.

Petitioner appealed the Bankruptcy Court's decision to the District Court. On November 18, 1985, the District Court entered its minute order affirming the Bankruptcy Court's order.

Petitioner appealed the District Court's decision to the Ninth Circuit Court of Appeals. On November 3, 1986, that court entered its unpublished opinion affirming the Bankruptcy Court's order.

On January 29, 1987, Petitioner filed the instant Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REASONS FOR DENYING THE PETITION

ARGUMENT

I

The Purported Conflict Between the Circuits Is Immaterial to the Resolution of This Case

Petitioner predicates its petition exclusively upon a perceived conflict between the circuits regarding the operation of 11 U.S.C. section 548. In particular, Petitioner describes certain perceived differences between the holdings of *Durett v. Washington National Insurance Company,* 621 F.2d 201 (C.A.5th, 1980) and *In re Madrid,* 725 F.2d 1197 (C.A.9th, 1984), cert. denied 469 U.S. 833 (1985). This perception of conflict is immaterial to the case at bar because the cases construe different statutes. *Durrett v. Washington National Insurance Company* construed the fraudulent conveyance provisions of the former Bankruptcy Act, found

at repealed 11 U.S.C. section 67. *In re Madrid,* on the other hand, construed the fraudulent conveyance provisions of the current Bankruptcy Code, found at 11 U.S.C. section 548. While the similarity of these two statutes has provided the commentators and lower courts with ample grounds for comment and analysis, it cannot be said that the holdings of these two cases create a conflict between the circuits, within the ambit of Supreme Court Rule 17.1(a).

II

The Petition Does Not Articulate an Important Question of Federal Law which Should Be Settled by this Court

The Petition expresses dissatisfaction with the holdings of *In re Madrid, supra,* and the Ninth Circuit Court of Appeals below, presumably on the policy ground that the holdings "eliminate the flexibility" of the bankruptcy courts. Notwithstanding this generalized dissatisfaction, the Petition sets forth no grounds for concluding that the decision below involves some important question of federal law which should be decided by this Court. As a consequence, this Court should conclude that the Petition articulates no grounds under Supreme Court Rule 17.1(c) for the issuance of the requested writ.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

February 27, 1987

Respectfully submitted,

STEVEN B. STABLER*
ROBERT F. KIDD
LAWRENCE A. CALLAGHAN

**Counsel of Record*
for Respondent.

(Appendix follows)

APPENDIX R-A

Steven A. Schwaber
Kadenacy, Cohen & Schwaber
Eleventh Floor
411 West Fifth Street
Los Angeles, California 90013
(213) 622-6671
Attorneys for Debtor

United States Bankruptcy Court
Central District of California

Chapter 11
Bankruptcy No. LA 84-21176 BR
Adversary No. LA 84-53394 BR
In Re Dierk Hagemann,
Debtor.

Dierk Hagemann,
Plaintiff,

vs.

American Savings And Loan Association,
a California corporation,
Defendant.

COMPLAINT TO SET ASIDE DEED
(Defective Sale)
[Filed Dec. 21, 1984]

Debtor and plaintiff DIERK HAGEMANN (hereinafter, "HAGEMANN") for a cause of action against defendant AMERICAN SAVINGS AND LOAN ASSOCIATION ("AMERICAN") to set aside a trustee's sale of plaintiff's property alleges as follows:

1. On or about October 24, 1984, debtor and defendant Hagemann filed a voluntary petition under Chapter 11 of Title 11 of the United States Code to reorganize his financial affairs. Therefore, this Court has jurisdiction of the instant matter pursuant to 11 U.S.C. § 157.

2. At all times mentioned herein and relevant hereto, defendant AMERICAN was and is a California corporation engaged in the business of a savings and loan association and was and is doing business within the Central District of California.

3. Until the date of September 5, 1984, plaintiff and debtor HAGEMANN was the owner of that certain real property located at 631 Paseo de la Playa, in the City of Torrance, State of California. Said property was the principal residence of plaintiff HAGEMANN and his minor child. Defendant AMERICAN was the beneficiary of the first deed of trust on said property, which deed of trust secured a promissory note to AMERICAN in the approximate amount as of that date, inclusive of principal and accrued interest, of $340,000.00, more or less.

4. For various and diverse reasons beyond his control, plaintiff HAGEMANN was prior to the filing of the above-described Chapter 11 petition, in default at certain times with regard to the making of payments due under and pursuant to the promissory note secured by the above-described deed of trust. As a result of said default, defendant AMERICAN commenced foreclosure proceedings on or about February 27, 1984. Following the commencement of said foreclosure proceedings, plaintiff HAGEMANN entered into a Forebearance Agreement with defendant AMERICAN, which agreement set forth a schedule of payments intended to and which would have cured the default to AMERICAN. A copy of this Forebearance Agreement is attached hereto as Exhibit "1", and is incorporated herein by reference as though fully set forth at this point.

5. Pursuant to said Forebearance Agreement, defendant AMERICAN mailed a letter to plaintiff HAGEMANN purporting to be a notice of continuance of the sale date of the subject property. A copy of this letter is attached hereto as Exhibit "2", and is incorporated herein by reference as though fully set forth at this point.

6. Plaintiff HAGEMANN timely effected payments of the sums due July 1, 1984 and August 1, 1984. On September 5, 1984, at approximately 10:45 a.m., plaintiff HAGEMANN appeared at an office of AMERICAN SAVINGS with a cashier's

check for the payment due September 1, 1984. Said payment was refused by defendant AMERICAN at that time on the grounds that the trustee's sale took place on September 5, 1984, at 10:00 a.m. Plaintiff has been informed, and on the basis of such information believes and alleges that in fact said trustee's sale did take place at 10:00 a.m. on September 5, 1984. Said sale was defective, and the deed pursuant thereto a nullity, due to inadequate and improper notice of said trustee's sale as required by California Civil Code § 2924g(a). However, plaintiff has been informed and on the basis of such information believes and alleges that a trustee's deed pursuant to said purported sale was given to defendant AMERICAN and was recorded by defendant AMERICAN, and constitutes a cloud on plaintiff's title to and interest in said real property.

7. Plaintiff is informed, and on the basis of such information believes and alleges that defendant AMERICAN was the sole bidder at the trustee's purported sale, and that the amount bid and paid by defendant AMERICAN at said sale was the amount due under and pursuant to the above-described promissory note secured by said deed of trust. This amount, as hereinabove alleged, was the sum of $340,000.00, more or less. At the time of the purported trustee's sale of said property, the subject real property had a fair market value in excess of One Million One Hundred Thousand Dollars ($1,100,000). Said sale constituted a fraudulent transfer within the meaning and operation of 11 U.S.C. § 548.

8. Demand has been made upon defendant AMERICAN to restore the title to said property to debtor and plaintiff HAGEMANN, and defendant AMERICAN has wholly failed and refused, and continues to fail and refuse, to restore title to said property to debtor and plaintiff HAGEMANN.

9. The legal description of the real property affected by this Section is set forth in Exhibit "3" to this complaint, which is incorporated herein by reference as though fully set forth at this point.

WHEREFORE, debtor and plaintiff HAGEMANN prays for judgment as follows:

1. For an order of this Court setting aside the purported trustee's sale and deed issued and recorded pursuant thereto;

2. For an order of this Court declaring title to said property revested in the debtor and debtor-in-possession DIERK HAGEMANN;

3. For all costs of suit herein, including a reasonable sum by way of attorneys' fees; and

4. For such other and further relief as this Court deems just and proper.

Dated: December 21, 1984.

KADENACY, COHEN &
SCHWABER

/s/ By STEVEN A. SCHWABER
Steven A. Schwaber
Attorneys for Plaintiff

EXHIBIT 1

Loan No: 030-1003719
TS No:

FOREBEARANCE AGREEMENT

THIS FOREBEARANCE AGREEMENT is entered into this 5th day of July, 1984, by and between Dierk Hagemann ("Borrower") and AMERICAN SAVINGS AND LOAN ASSOCIATION formerly STATE SAVINGS AND LOAN ASSOCIATION a California Corporation ("Beneficiary").

RECITALS

A. Beneficiary has heretofore made a loan for which Borrower is liable, evidenced by a promissory note and secured by that certain Deed of Trust dated 4-1-84 and recorded 4-4-84;

B. On 2-27-84, and as a result of Borrower's default under the terms and conditions of said promissory note and Deed of Trust, Trustee, at the direction and on behalf of Beneficiary, commenced proceedings to foreclose on the Deed of Trust and, in accordance therewith recorded that certain Notice of Default as instrument number 84-236138, in the County of Los Angeles, State of California; and

C. To assist Borrower in curing said default, Beneficiary, agrees to accept, and Borrower agrees to make, partial payments pursuant to the terms and conditions set forth herein.

NOW THEREFORE, in consideration of the foregoing and other valuable consideration, the parties hereto agree as follows:

1. *Repayment Schedule.* Borrower agrees to make payments to Beneficiary, said payments to be applied by Beneficiary to the delinquent amounts owing under said promissory note and Deed of Trust, in accordance with the following schedule:

Due on July	1st 1984	Principal & Interest payment	$3,786.67	Rec. LA Br. 6-26-84
Due on Aug.	1st 1984	Principal & Interest payment	$3,786.67	Cashiers check only
Due on Sept.	1st 1984	Principal & Interest payment	$3,786.67	Cashiers check only
Due on Sept.	15th 1984	⅓ of Delinquency	$15,620.30	Cashiers check only
Due on Oct.	1st 1984	Principal & Interest payment	$3,786.67	Cashiers check only
Due on Oct.	15th 1984	⅓ of Delinquency	$15,620.30	Cashiers check only
Due on Nov.	1st 1984	Principal & Interest payment	$3,786.67	Cashiers check only
Due on Nov.	15th 1984	⅓ of Delinquency	$15,620.30	Cashiers check only

2. *Foreclosure Proceedings.* Until such time as all past due amounts have been paid bringing the subject loan to a current status, neither the acceptance nor processing of partial payments made by Borrower pursuant to the provisions of paragraph 1, above, shall (1) be deemed a waiver by Beneficiary of Borrower's default under the promissory note and Deed of Trust, (2) constitute a partial reinstatement of the subject loan and/or (3) affect in any respect beneficiary's foreclosure on the Deed of Trust.

3. *Default.* It is expressly understood that all payments made pursuant to this Agreement will be applied to the subject loan as specified herein and that none of the payments will be refunded should Borrower default under any of the terms and/or conditions of this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the date first above written.

AMERICAN SAVINGS & LOAN ASSOCIATION
Beneficiary

By Lesw Krieg
Department Manager

By _____

_____
Borrower

_____
Borrower

_____
Borrower

EXHIBIT 2

[Letterhead]

Mr. Dierk Hagemann
631 Paseo De La Playa
Torrance, CA 90277

July 3, 1984

Dear Mr. Hagemann,

Enclosed is the forebearance agreement, as discussed with your attorney Mr. Steve Schwaber. Please read and sign and return original to address below.

Please be advised that sale dates are set as follows:

Sale Date 7-11-84 was postponed 6-26-84 payment received
Sale Date 8-08-84 effected if 8-01-84 payment not received
Sale Date 9-05-84 effected if 9-01-84 payment not received
Sale Date 10-03-84 effected if 10-01-84 payment not received
Sale Date 11-07-84 effected if 11-01-84 payment not received

Should any of the scheduled payments not be met, the sale date becomes effective as shown, after each scheduled payment is made the Trustee Sales Officer postpones the sale date to the next month, if there are any questions regarding this please call me collect at the number below.

Sincerely,

AMERICAN SAVINGS
AND LOAN
540 E. Main Street
Stockton, CA 95202

/s/ Les Krieg
Les Kreig
Sr. Loan Counselor
(209) 943-3064

EXHIBIT 3

Lot 149 of Tract No. 18379, in the City of Torrance, County of Los Angeles, State of California, as per map recorded in Book 563 Pages 9 to 14 inclusive of Maps, in the office of the county recorder of said County.

EXCEPT all oil, gas and other hydrocarbon substances underlying said land, but upon the express understanding and agreement that no operations of any kind or character may at any time be conducted upon said land in exploration for or on the production of any such material and no facilities of any kind or character shall ever be erected or maintained upon said premises in connection with any such operation, and reserved in the deed from Ocean View Properties, Inc., recorded in Book 24379 Page 114, Official Records of said County.

ALSO EXCEPT any portions thereof lying outside of the patent lines of the Rancho Los Palos Verdes, as such lines existed at the time of the issuance of the patent, which were not formed by the deposit of alluvion from natural causes and by imperceptible degrees.

Said land is also known as 631 Paseo De La Playa, Torrance, California.